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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD GEORGE,

Plaintiff,

v.

UNITED STATES

Defendant.

Case No.: C 07 4673 MJJ

**RICHARD GEORGE'S OPPOSITION
TO DEFENDANT'S MOTION TO
DISMISS AND MEMORANDUM OF
LAW IN OPPOSITION TO MOTION TO
DISMISS**

Date: March 4, 2008

Time: 9:30 a.m.

Courtroom: 11, 19th Floor

**OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
AND MEMORANDUM OF LAW**

INTRODUCTION

On September 7, 2007, plaintiff, Richard George, filed a complaint against defendant, United States ("Government"), for damages due to the Government's unauthorized tax collection actions. Plaintiff alleges defendant's agents recklessly and intentionally, and by reason of negligence, violated provisions of the Internal Revenue Code ("IRC") and regulations promulgated there under and that plaintiff has exhausted his available administrative remedies within the Internal Revenue Service. The Government failed to answer plaintiff's complaint or otherwise defend within the 60-day time period required by Fed. R. Civ. Proc., Rule 12(a)(2), C-07-4673 MJJ

1 Rule 15(a), and Rule 81(c). Because of the Government's failure to follow the federal rules of
2 procedure, plaintiff filed a Motion for Default Final Judgment on January 14, 2008. On January
3 15, 2008 the Government filed a Motion to Dismiss. Both motions are set for hearing on March
4 4, 2008.

5 **PROCEDURAL HISTORY**

6
7 Plaintiff filed a prior complaint for equitable relief on February 14, 2005 and that action
8 was removed to this court (No. C05-00955 MJJ). On Sept. 7, 2005, plaintiff filed a Claim for
9 Damages with the Area Director of the IRS. See plaintiff's accompanying Declaration ("George
10 Decl.") Exhibit A. Plaintiff's Claim for Damages was filed in accordance with Treasury Reg. §
11 301.7433 and claimed past and ongoing damages for the maximum allowable under law
12 (\$1,000,000) for each of the years 1997-1999. On Sept. 8, 2005 plaintiff filed a 3d Am.
13 Complaint in this Court that included damages under 26 U.S.C. § 7433. In response to plaintiff's
14 3d Am. Complaint this Court stated "that Plaintiff timely requested a due process hearing
15 pursuant to §6320," but failed to file "the necessary claim in accordance with § 301.7433-1(e)"
16 prior to bringing the action. Plaintiff did not receive a response from the Government to his Sept.
17 7, 2005 Claim for Damages and therefore filed the present action in the California Superior
18 Court, San Mateo County, on September 7, 2007. The Government petitioned for removal of this
19 action from state court claiming this court's jurisdiction under U.S.C. Title 28, §§ 1441, et. seq.

20 **STATEMENT OF FACTS**

21
22 According to the Declaration of Jane Allen ("Allen Decl.") included with the Declaration
23 of Thomas Moore ("Moore Decl."), the Government levied Chameleon Software's bank account
24 "on or about July 26, 2004" as the "alter ego/nominee" of plaintiff. Allen Decl. ¶ 16. According
25 to the same declaration "on or about August 13, 2005, the Service recorded a Notice of Federal
26 Tax Lien" naming "Chameleon Software as the alter ego/nominee" of plaintiff. By Allen's own
27 admission, the IRS levied Chameleon's bank account prior to issuing the lien. On July 29, 2004,
28 Bank of America froze Chameleon's bank account and on July 30th, August 4th, and August 5th

1 Bank of America bounced checks written against Chameleon's account. See George Decl. Exh.
 2 B. According to Chameleon's Bank of America checking account statement, the IRS issued a
 3 replacement levy on August 9, 2005, 11 days after the initial levy. George Decl. Exh. B.

4 Furthermore, plaintiff has kept the Government and their counsel well informed of the
 5 damages he has sustained. In addition to filing a Claim for Damages on Sept. 7, 2005, plaintiff e-
 6 mailed the chief counsel for the defense, Thomas Moore, on April 28, 2006, with a Preliminary
 7 Accounting of Damages. See George Decl. Exh. C.

8 LEGAL ARGUMENT

9
 10 The United States Congress promulgates legal provisions in the form of statutes and rules
 11 of court. These legal provisions, when made in accordance with the Law of the Land, are
 12 obligatory, i.e. not subject to whim. In this matter the relevant legal provisions are the federal
 13 rules of procedure concerning the time period for answering a complaint and the taxation statutes
 14 relating to due process, liens, levies, confidentiality, and unauthorized collection actions.

15 Rule 12(a)(2) of the Federal Rules of Civil Procedure provides that the United States
 16 must serve an answer to a complaint within 60 days after service on the United States attorney.
 17 As noted above, the Complaint in this case was filed on September 7, 2007 and served on the
 18 United States attorney. The Summons, issued by the California Superior Court on September 7
 19 and served upon the defendant together with the Complaint, notified the defendant of its
 20 obligation to file an answer, and to serve a copy of the Answer upon Richard George, within
 21 sixty days from the date of service. Sixty days from the September 7 service date was November
 22 6, 2007. As of November 6, defendant had not filed an answer with the Clerk, had not served an
 23 answer upon Richard George, and had not otherwise responded. The defendant's Motion to
 24 Dismiss must therefore be rejected out of hand because of their failure to comply with the Fed.
 25 R. Civ. Proc. 12(a)(2), which become a habitual pattern in this dispute.

26 The Government moves for dismissal under Fed. R. Civ. Proc. 12(b)(1) "for lack of
 27 subject matter jurisdiction." This argument is completely untenable given that the Government
 28 removed this action from state court claiming this court's jurisdiction, as stated above, under

1 U.S.C. Title 28, §§ 1441, et. seq. The Government cannot now turn around and claim this Court
2 lacks jurisdiction, they cannot have it both ways. This Court either has jurisdiction or it does not.
3 If the Court does not have jurisdiction as claimed in the defendant's motion to dismiss then the
4 court should remand the case back to state court. If the Court does have jurisdiction, as
5 unanimously decided in *Lapides v. Bd. of Regents*, 535 U.S. 613, 152 L.Ed.2d 806 (2002)
6 (Voluntary removal invokes the federal court's jurisdiction), then the Government's motion for
7 dismissal should be denied.

8 The IRS violated plaintiff's due process rights by levying Chameleon Software's bank
9 account prior to issuing a lien. A lien is meant to give the recipient the right to request a due
10 process hearing as required by 26 U.S.C. § 6320. As stated above, the IRS issued a levy against
11 plaintiff's company, Chameleon Software, prior to issuing a lien and giving plaintiff the
12 opportunity to be heard. Although plaintiff did request a due process hearing within the 30-day
13 time period required by 26 U.S.C. § 6320 (George Decl. Exh. A), it was well after the IRS seized
14 Chameleon Software's assets. Furthermore, § 6320 requires that "the Secretary shall notify in
15 writing ... not more than 5 business days after the day of the filing of the notice of lien."
16 Nowhere in this or any related matter has the Government provided any evidence that they have
17 complied with the 5-day lien notification provision with regard to any liens related to plaintiff.

18 The IRS violated Section 6331 by extending their levy beyond the property existing at the
19 time the levy was initially received by the Bank of America. As stated above and as show by
20 George Decl. Exh. B, the bank received a levy on July 29, 2004. The Government claims Allen
21 mistakenly issued the levy and that "her acting manager noticed two or three days later that the
22 levies needed to be signed by the territory manager." Mot. to Dism. III. B. The Government
23 claims that "the failure of Revenue Officer Allen to obtain the correct signature of the issuing
24 official is merely a failure to follow a procedural rule" that "there is no requirement... that such
25 levies cannot be issued by revenue officers." Ibid. The problem is that Chameleon Software had
26 approximately \$18,000 in its account on July 29th and three checks bounced between the time of
27 the initial levy and the replacement levy. Then on August 9th the replacement levy was issued
28 that attached an additional \$36,000 that was deposited to its workers because the first levy

1 caused Chameleon Software to bounce checks. Chameleon had to replace the funds initially
2 levied in order to meet its obligations. The Government's actions in this case clearly violate the
3 intent of § 6331 and if allowed to stand would indicate nothing less than a free pass to issue
4 perpetual levies – clearly not what was intended by Congress. If, as the Government argues,
5 there was nothing wrong with Allen issuing the initial levy, then why would the IRS need to
6 issue a replacement levy? And if the initial levy was good then the additional funds that did not
7 exist in Chameleon's account at the time of the initial levy should not have been seized later. The
8 Government's story about what happened clearly does not add up.

9 This action arises under 26 U.S.C. § 7433, which states that an action may be brought
10 "within 2 years after the date the right of action accrues." Plaintiff filed a Claim for Damages
11 with the IRS Area Director on Sept. 7, 2005 in accordance with Treasury Reg. § 301.7433
12 (George Decl. Exh. A). 26 C.F.R. § 301.7433 provides that no civil action may be maintained in
13 federal district court prior to filing an administrative claim and that once a claim is filed the
14 claimant must wait until an administrative decision is rendered or six months, whichever occurs
15 earlier. Since the Government did not respond to plaintiff's claim for damages within six months,
16 plaintiff's right of action did not accrue until six months after Sept. 7, 2005. An accrued right is a
17 "matured cause of action, as legal authority to demand redress" (Black's Law Dictionary, 6th
18 Ed.). Nevertheless, as plaintiff's Claim for Damages states, he has suffered ongoing injuries, and
19 he continues to suffer injuries to this day, due to the Government's reckless, intentional, and
20 negligent acts.

21 The Internal Revenue and Restructuring and Reform Act of 1998, Pub. L. No. 105-206,
22 112 Stat. 685, 727, enacted on July 22, 1998, shifted the burden of proof to the government in
23 court proceedings arising in connection with examinations commencing after the date of
24 enactment. See also 26 U.S.C. § 7491, which provides the following with respect to interest and
25 penalties:

26 Notwithstanding any other provision of this title, the Secretary
27 shall have the burden of production in any court proceeding with
28 respect to the liability of any individual for any penalty,
addition to tax, or additional amount imposed by this title.

1 Tax laws are clearly in derogation of personal rights and property interests and are,
2 therefore, subject to strict construction, and any ambiguity must be resolved against imposition
3 of the tax. In *Billings v. U.S.* 232 U.S. 261, 34 S.Ct. 421 (1914), the Supreme Court clearly
4 acknowledged this long-standing rule of statutory construction:

5 Tax statutes ... should be strictly construed, and, if any
6 ambiguity be found to exist, it must be resolved in favor of the
7 citizen. *Eidman v. Martinez*, 184 U.S. 578, 583; *United States v.*
8 *Wigglesworth*, 2 Story, 369, 374; *Mutual Benefit Life Ins. Co. v.*
9 *Herold*, 198 F. 199, 201, aff'd 201 F. 918; *Parkview Bldg. Assn. v.*
10 *Herold*, 203 F. 876, 880; *Mutual Trust Co. v. Miller*, 177 N.Y. 51, 57

11 "If the words are doubtful, the doubt must be resolved against the Government and in favor of
12 the taxpayer. *Gould v. Gould*, 245 U.S. 151, 153

13 CONCLUSION

14 For the reasons stated herein, the Court should deny the Government's Motion to
15 Dismiss.

16 Dated this 12th day of February, 2008

17
18
19 By 

20
21 Richard George
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24 Telephone: (650) 327-6319
25
26
27
28

CERTIFICATE OF SERVICE

Case Name:

Richard George v. United States

Case No.: C 07 4673 MJJ

This is to certify that a copy of:

**RICHARD GEORGE'S OPPOSITION TO DEFENDANT'S MOTION TO
DISMISS AND MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO
DISMISS**

AND

**DECLARATION OF RICHARD GEORGE IN OPPOSITION TO
DEFENDANT'S MOTION TO DIMISS**

was served, by first-class mail, on the person listed below.

Thomas Moore
Assistant United States Attorney
10th Floor Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102

I declare under penalty of perjury that the foregoing is true and correct.



Richard George

Executed on February 12, 2008